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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

A.H. ROBINS COMPANY, INCORPORATED,
Petitioner,

v.

HONORABLE FRANK G. THEIS,
Judge of the United States District Court
for the District of Kansas,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTION PRESENTED

May a United States district judge rule on factual issues concerning which he has previously been a witness by giving an affidavit in a separate judicial proceeding?

PARTIES IN THE TENTH CIRCUIT

A.H. Robins Company, Incorporated*

The Honorable Frank G. Theis, United States District Judge For The District of Kansas

Note: The proceedings in the district court involved all cases pending in the *A.H. Robins "Dalkon Shield" IUD Products Liability Litigation*, MDL-211 (D. Kan.). The numerous plaintiffs, who are all individuals, were not specifically named in the papers in either the district court or the Tenth Circuit.

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* Pursuant to Rule 28.1, Petitioner A.H. Robins Company, Incorporated states that it has no parent or affiliated corporations other than wholly-owned subsidiaries.

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IN THE

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No.

A.H. ROBINS COMPANY, INCORPORATED,
Petitioner,

v.

HONORABLE FRANK G. THEIS,
Judge of the United States District Court
for the District of Kansas,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner A.H. Robins Company, Incorporated ("A.H. Robins") respectfully petitions for a writ of certiorari to review the judgment of the Tenth Circuit Court of Appeals.

OPINIONS BELOW

The Tenth Circuit did not issue an opinion. Its Order dated March 15, 1985, which has not been reported, is attached as Appendix ("App.") A. Judge Theis' Opinion and Order dated February 1, 1985 (App. B) denying A.H. Robins' motion to disqualify has not been reported.

JURISDICTION

A.H. Robins seeks review of an Order entered by the Tenth Circuit on March 15, 1985. A.H. Robins did not petition for rehearing.

Jurisdiction is conferred upon this Court by 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Title 28 U.S.C. § 455(a) provides as follows:

> Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

STATEMENT OF THE CASE

(a) Summary

This petition arises out of the nationwide Dalkon Shield litigation, which is now well into its second decade. Approximately 3,700 separate Dalkon Shield lawsuits are now pending against A.H. Robins in state and federal courts; approximately 7,000 other cases have been disposed of through settlement of judgment.

Since the beginning of this litigation, A.H. Robins has moved to disqualify only two judges. The first was Chief Judge Miles W. Lord of the District of Minnesota. *See Gardiner v. A.H. Robins Co.*, 747 F.2d 1180 (8th Cir. 1984). The second was Judge Frank G. Theis of the District of Kansas. Although the two motions to disqualify are related, this petition involves only the motion to recuse Judge Theis.

In April 1984, A.H. Robins filed a judicial misconduct complaint against Judge Lord under 28 U.S.C. § 372(c). At the written request of Judge Lord, the proceedings against him were opened to the public. *See* 28 U.S.C. § 372(c)(14)(A). Judge Lord's defense focused on his claim that A.H. Robins had not responded in good faith to plaintiffs' discovery. The Eighth Circuit rejected this defense. *Gardiner*, 747 F.2d at 1193.

To support the claim of discovery abuse, Judge Lord's counsel solicited an affidavit from Judge Theis. This was

done without any notice to A.H. Robins. The affidavit (App. C) was executed by Judge Theis and used in Judge Lord's defense. The affidavit became a public document and has been used against A.H. Robins in other cases.

Five months after the affidavit was executed, and six weeks after *Gardiner*, plaintiffs filed a motion (App. D) before Judge Theis for sanctions against A.H. Robins under Fed. R. Civ. P. 37(b). A side-by-side comparison of Judge Theis' affidavit and plaintiffs' motion shows that both make similar accusations against A.H. Robins. Thus, Judge Theis was called upon as a judge to rule on issues of fact that were the subject of his affidavit, which he submitted as a witness.

Faced with this situation, A.H. Robins moved to disqualify Judge Theis. The motion was denied, and the Tenth Circuit, without hearing oral argument, refused mandamus.

This petition for certiorari does not present any dispute on the facts or the applicable legal standard. Certiorari is warranted in this case because permitting Judge Theis to rule on plaintiffs' motion is an extreme departure from the accepted and usual course of judicial proceedings and requires this Court's supervision.

(b) The Role of Judge Theis In The Dalkon Shield Multidistrict Litigation

Since 1975, Judge Theis has supervised consolidated pre-trial proceedings (pursuant to 28 U.S.C. § 1407) in more than 1,000 cases alleging injuries caused by the Dalkon Shield. *See A.H. Robins Co., Inc. "Dalkon Shield" IUD Products Liability Litigation*, 406 F. Supp. 540 (J.P.M.L. 1975). This massive litigation, however, was never consolidated for trial in the District of Kansas under 28 U.S.C. § 1404, primarily because most of these cases could not have been brought in that district in the first instance. All Dalkon Shield cases pending before Judge Theis are diversity actions under 28 U.S.C. § 1332(a)(1).

(c) The Submission Of Judge Theis' Affidavit

On April 25, 1984, A.H. Robins and three of its officers filed judicial misconduct complaints against Chief Judge Miles W. Lord of the District of Minnesota. On May 1, 1984, Chief Judge Donald P. Lay of the Eighth Circuit ordered an investigation of the complaints. At the express written request of Judge Lord, the investigation was made a matter of public record pursuant to 28 U.S.C. § 372(c)(14)(A).

Judge Lord defended his conduct on the defense that A.H. Robins had abused the discovery process. The Eighth Circuit later rejected this theory and held that Judge Lord's conduct "exhibit[ed] a pervasive bias and prejudice" against A.H. Robins. *Gardiner*, 747 F.2d at 1192-93.

On July 5, 1984, counsel for Judge Lord filed a five-page affidavit signed by Judge Theis (App. C), which then became a matter of public record. On July 9, in a public hearing before an investigatory committee of the Eighth Circuit Judicial Council, Judge Lord's counsel explained the origin of the affidavit:

> MR. BELL (counsel for A.H. Robins): Did you give us any notice that you were going to contact Judge Theis and let us have someone to respond to these reports?
>
> MR. WALTERS (counsel for Judge Lord): No, Judge Bell, I did not give any notice that I was in contact with Judge Theis.

(Relevant excerpts from the transcript of this hearing are attached in App. E.)

Because the assertions made by Judge Theis in the affidavit were damaging and, in A.H. Robins' view, erroneous, counsel for A.H. Robins met with Judge Theis and plaintiffs' lead counsel in chambers on July 20, 1984. Judge Theis described his affidavit as follows:

> JUDGE THEIS: But, my apprehensions, *from reading the—as I said, I read that affidavit, too. It was couched in what I call weasel words, in a way.* If you're not sure of something, you qualify about it "it appears to me", and so forth, and it certainly gave a strong appearance to me, and that was my reaction, that somebody had been pulling the wool over my eyes.

(Emphasis added; relevant excerpts from the July 20 conference in chambers are attached as App. F.)

(d) Plaintiffs' Motion For Discovery Sanctions

On December 13, 1984, plaintiffs in the consolidated cases before Judge Theis filed a motion for discovery sanctions against A.H. Robins (App. D). Plaintiffs' motion for sanctions rests on the same factual issues addressed in Judge Theis' affidavit, as shown below:

Judge Theis' Affidavit (July 1984)	Plaintiffs' Memorandum In Support of Motion for Sanctions (December 1984)
Without the necessity of comparing document by document what was or was not produced, *it would appear to me that a great volume of material was numbered for production but not produced, and that thousands of other documents were neither numbered, reviewed for relevance or privilege, nor produced.* It would appear to me that representations made to me concerning the completeness of discovery during the MDL proceedings are open to serious question . . . It would seem, in the light of the disclosures by the Masters, *that serious questions exist as to whether or not counsel who appeared before me, or their client, should be disciplined under Rule 16.*	Since [A.H. Robins] . . . has *withheld and destroyed sensitive documents,* it should be required to pay all costs of additional document production. Because *defendant wrongfully withheld key documents* and delayed recall of the device, it is now necessary to take additional videotaped depositions. Since the necessity for these depositions resulted from wrongful conduct, defendant should be ordered to produce the witnesses in Wichita, Kansas, and pay all costs, attorney fees, and expenses which result. Additional sanctions should be levied against defendant as requested in plaintiffs' motion.

(e) The Public Nature of Judge Theis' Affidavit

Judge Theis' affidavit has been published, *see* 1984 *OB/GYN Litigation Reporter*, 3,084-085 (Sept. 26, 1984) (full text of affidavit), discussed in the news media, *e.g.*, Mintz, "Jurist Hands A.H. Robins A Setback: Lord's Words 'Mild Punishment,'" The Washington Post, July 7, 1984, at A2, col. 4 (quoting from affidavit), and cited against A.H. Robins in other Dalkon Shield cases, *e.g.*, Motion To Compel Production With Supporting Brief 6, *Wolf v. A.H. Robins Co.*, No. H-84-638 (S.D. Tex., filed Dec. 20, 1984) ("Judge Theis concludes [in his affidavit] that Robins misled the MDL court when it represented that it had produced all requested documents . . ."). Judge Theis' affidavit has even been cited to Judge Theis. Amicus Brief In Support Of Plaintiff's Motion To Compel 21, *In re A.H. Robins "Dalkon Shield" IUD Products Liability Litigation*, MDL-211 (D. Kan., filed Jan. 2, 1985).

(f) A.H. Robins' Motion To Disqualify, And The Decisions Below

On January 10, 1985, A.H. Robins moved to disqualify Judge Theis on the ground that his affidavit in defense of Judge Lord disqualified him under 28 U.S.C. § 455(a) from ruling on plaintiffs' motion. On February 1, 1985, Judge Theis issued an Opinion and Order denying the motion to disqualify (App. B). Although the Opinion and Order is twenty-one typed pages, it does not describe or mention the circumstances surrounding the drafting or execution of Judge Theis' affidavit.

A.H. Robins petitioned the Tenth Circuit for a writ of mandamus. On February 19, the Tenth Circuit requested briefs from the opposing parties, which were submitted. On March 15, 1985, without hearing oral argument, the Tenth Circuit denied mandamus without opinion.

As of the date of this petition, Judge Theis has not issued a ruling on plaintiffs' motion for sanctions. If such a ruling is issued while this petition is pending, A.H. Robins will promptly advise the Clerk of this Court.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted in this case because, in allowing Judge Theis to rule on plaintiffs' motion for discovery sanctions, the Tenth Circuit has sanctioned an extreme departure from the accepted and usual course of judicial proceedings, which calls for an exercise of this Court's supervision. Supreme Court Rule 17.1(a).

Judge Theis was a witness *against* A.H. Robins in the judicial misconduct proceeding. He now claims, however, that his impartiality in ruling on plaintiffs' motion for sanctions cannot reasonably be questioned under 28 U.S.C. § 455(a). In his Opinion and Order, Judge Theis makes the remarkable assertion that the affidavit does not "exhibit any predisposition for or against any party or counsel." Yet his affidavit concludes as follows:

> *Without knowing all of the details* it appears that under the circumstances known, Judge Lord's remonstrance to the responsible company officials was *mild punishment indeed considering the strong possibility that such apparent misrepresentations and trial tactics seem to permeate the proceedings here and elsewhere* (emphasis added).

A reasonable person, after reading this sentence, would surely conclude that Judge Theis lacked impartiality.

This Court has held that the finder of fact must be "free from external causes tending to disturb the exercise of deliberate and unbiased judgment." *Mattox v. United States*, 146 U.S. 140, 149 (1892) (ordering new trial in criminal case on ground of *ex parte* contacts with jury). Judge Theis intends to sit as the fact-finder on plaintiffs' motion for sanctions. Yet he dealt pri-

vately with counsel in a separate proceeding and submitted an affidavit on what is now the subject of plaintiffs' motion. He intends to be a judge where he was formerly a witness. This is not mere error. This is an extreme departure from a basic precept of this country's jurisprudence. *See In re Murchison*, 349 U.S. 133, 136 (1955); Code of Judicial Conduct for United States Judges, Canon 3(A)(4) and (6), at 69 F.R.D. 275-76 (1975).

This is not a case such as *United States v. Grinnell Corp.*, 384 U.S. 563, 582-83 (1966), where the judge's knowledge of the facts resulted from a review of the record in the case before him. Nor is it similar to the case where a judge testified *before* nomination to the federal bench. *See Laird v. Tatum*, 409 U.S. 824 (1972) (Memorandum opinion of Justice Rehnquist). Finally, this is not a situation where the judge earlier heard and decided a related case. *See Meeropol v. Nizer*, 429 U.S. 1337 (1977) (Memorandum opinion of Justice Marshall).

Instead, this case presents the question whether a federal judge should be permitted to be a witness in one proceeding, and a judge in another, with respect to the same facts. This Court has never addressed this important question.

The purpose of § 455(a) is to "deal with . . . the appearance of possible bias." *United States v. Will*, 449 U.S. 200, 216 (1980). *Cf. Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 150 (1968) ("[A]ny tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias"). The lower courts agree that the standard under § 455(a) is whether the relevant facts would lead a reasonable person to doubt the judge's impartiality, even though the judge himself believes he can be evenhanded. *Home Placement Service, Inc. v. Providence Journal Co.*, 739 F.2d 671, 674 (1st Cir.

1984) (citing cases and holding that judge who met privately with newspaper reporter who was employed by a party must be disqualified), *cert. denied*, 53 U.S.L.W. 3528 (Jan. 22, 1985).

There are five critical facts that show Judge Theis cannot be permitted to rule on plaintiffs' motion:

> (i) The misconduct proceeding was entirely separate from the multidistrict litigation pending before Judge Theis;
>
> (ii) Judge Theis voluntarily became a witness in the misconduct proceeding by submitting his affidavit;
>
> (iii) The affidavit was not based on any record evidence before Judge Theis;
>
> (iv) Judge Theis gave A.H. Robins no prior notice that he was conferring privately with Judge Lord's counsel and preparing the affidavit; and
>
> (v) Plaintiffs' motion for discovery sanctions rests on factual questions that Judge Theis had already answered in his affidavit.

In light of these facts, the denial of mandamus [1] by the Tenth Circuit amounts to permitting Judge Theis to combine the inconsistent roles of witness and judge. This so far departs from the accepted and usual course of judicial proceedings as to warrant review by this Court.

---

[1] Although the Tenth Circuit gave no reason for denying the writ, it is clear that mandamus was the appropriate remedy. *Bell v. Chandler*, 569 F.2d 556, 559 (10th Cir. 1978) ("There is no question but that a mandamus petition may be used to force the disqualification of a district court judge").

CONCLUSION

For the reasons stated in this petition, A.H. Robins requests this Court to grant the writ of certiorari to review the judgment of the Tenth Circuit.

Respectfully submitted,

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April 15, 1985

APPENDICES

APPENDIX A

MARCH TERM—March 15, 1985

Before Honorable Monroe G. McKay, Honorable James K. Logan, and Honorable Stephanie K. Seymour, Circuit Judges, United States Court of Appeals [for the Tenth Circuit]

No. 85-1244

A.H. ROBINS COMPANY, INCORPORATED,
Petitioner,

v.

HONORABLE FRANK G. THEIS, Judge of the United States District Court for the District of Kansas,
Respondent.

This matter comes on for consideration of petitioner's application for a writ of mandamus to the district court directing the disqualification of the Honorable Frank G. Theis, Judge of the United States District Court for the District of Kansas.

Upon consideration thereof, the application is denied.

/s/ Howard K. Phillips
HOWARD K. PHILLIPS
Clerk

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

MDL Docket No. 211
"All Cases"

IN RE: A. H. ROBINS COMPANY, INC.,
"DALKON SHIELD" IUD
PRODUCTS LIABILITY LITIGATION

[Filed Feb. 1, 1985]

OPINION AND ORDER

Defendant A. H. Robins Company, Incorporated ("Robins") has filed a motion under 28 U.S.C. § 455(a) seeking the recusal of the presiding judge in this case. This motion is based solely upon this Court's filing of an affidavit before an investigatory panel of the Eighth Circuit Judicial Council concerning Robins' charges of judicial misconduct by the Honorable Miles W. Lord, Chief Judge of the United States District Court for the District of Minnesota.

Since December 10, 1975, this Court has presided over the instant multidistrict litigation ("MDL") proceedings, covering over a thousand federal cases and initially several hundred tagalong state cases involving products liability issues concerning the Dalkon Shield, a birth control device manufactured by Robins. During 1984, Judge Lord made certain remarks to Robins' executives during a set-

tlement conference involving seven Dalkon Shield lawsuits pending before him. As a result of these remarks, Robins filed a misconduct complaint against Judge Lord in the Eighth Circuit. In addition, Robins appealed the district court's actions during the settlement negotiations, which appeal was decided on November 2, 1984, in *Gardiner v. A. H. Robins Co., Inc.*, 747 F.2d 1180 (8th Cir. 1984). In the disciplinary proceeding before the Eighth Circuit Judicial Council, this Court filed an affidavit which related the discovery process in the multidistrict Dalkon litigation and which espoused the right of a judge to comment on the proceedings before him. On January 10, 1985, Robins filed the present motion for recusal.

The Court would first disassociate itself from the contention of plaintiffs' counsel that the Robins' disqualification motion is somehow untimely. The Court agrees with Robins that such motion is timely and within the ambit of counsels' duty to use all possible judicial processes to protect their client.

Initially at issue is the applicable legal standard governing the consideration of the motion for recusal. Under 28 U.S.C. § 455(a), "[a]ny . . . judge . . . shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." The 1974 amendment to section 455 changed the standard for recusal from a subjective one, which left to the judge "in his opinion" the decision whether it would be improper to sit, 28 U.S.C. § 455 (1970), to the present objective standard, which requires disqualification whenever the judge's impartiality "might reasonably be questioned." In its motion for recusal, Robins has placed emphasis on the single term "might." More properly, the inquiry should be whether "there is a reasonable factual basis for doubting the judge's impartiality. . . . Disqualification for lack of impartiality must have a *reasonable* basis." H. Rep. No. 1435, 93rd Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. News 6355 (emphasis in original). The

test is whether the charge of lack of impartiality is grounded on facts that would create a reasonable doubt concerning the judge's impartiality, not in the mind of the judge or in the mind of the litigant filing the motion for recusal, but rather in the mind of a reasonable person. *United States v. Cowden*, 545 F.2d 257, 265 (1st Cir. 1976), *cert denied*, 430 U.S. 909 (1977).

Prior to the 1974 amendment, the rule was that a judge had a duty to sit on a case if the statutory grounds for his disqualification had not been established. *See United States v. Diorio*, 451 F.2d 21, 24 (2nd Cir. 1971), *cert. denied*, 405 U.S. 955 (1972); *United States v. Anderson*, 433 F.2d 856, 860 (8th Cir. 1970); *Edwards v. United States*, 334 F.2d 360, 363 (5th Cir. 1964). Courts generally agree that the amended version of section 455 was intended to displace the so-called "duty to sit" decisions. *See, e.g., Parrish v. Board of Commissioners of the Alabama State Bar*, 524 F.2d 98, 103 (5th Cir. 1975). Recent decisions have noted, however, that a "trial judge has as much obligation not to recuse himself when there is no reason to as he does to recuse himself when the converse is true." *United States v. Bray*, 546 F.2d 851, 857 (10th Cir. 1976). *Accord United States v. Baskes*, 687 F.2d 165, 170 (7th Cir. 1981).

Several additional standards give the Court guidance in its consideration of Robins' motion for recusal, a motion the Court recognizes Robins did not make lightly. Dk. No. 727, p. 2. It is fundamental that the determination of bias, prejudice or lack of impartiality must be made on the basis of conduct which is extrajudicial in nature. *United States v. Grinnell*, 384 U.S. 563, 583, 86 S.Ct. 1698, 16 L.Ed.2d 778 (1966); *United States v. Bray*, 546 F.2d 851, 859 (10th Cir. 1976); *United States v. Patrick*, 542 F.2d 381, 390 (7th Cir. 1976); *United States v. Cook*, 400 F.2d 877, 879 (4th Cir. 1968), *cert. denied*, 393 U.S. 1100 (1969).

Plaintiffs allude to ulterior motives behind the present motion, such as forum-shopping. To evidence this contention, plaintiffs suggest that Robins' motion for class action certification, filed in *In Re: Dalkon Shield Punitive Damages Litigation*, No. 84-0884-R (E.D. Va., filed October 22, 1984), and Robins' motion for transfer of MDL 211 to the Eastern District of Virginia, filed with the Judicial Panel on Multidistrict Litigation, indicate an intent to shift the focus of the Dalkon Shield litigation to Robins' home district of Virginia. The Court believes that forum-shopping is not an appropriate subject of inquiry for the purposes of the present motion. A single matter is properly before the Court at this time: whether this Court should recuse under section 455.

The Court is mindful of the proposition that "disqualification is not favored where . . . a single judge has acquired by experience familiarity with a protracted, involved case which could not easily be passed on to a second judge." *City of Cleveland v. Cleveland Electric Illuminating Co.*, 503 F. Supp. 368, 370, *mandamus denied sub. nom City of Cleveland v. Krupansky*, 619 F.2d 576 (6th Cir. 1980). *See also National Auto Brokers Corp. v. General Motors Corp.*, 572 F.2d 953 (2nd Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979). With the above standards in mind, the Court shall proceed to analyze the substance of the parties' arguments.

The precise issue at hand is somewhat difficult to capsulize. Robins has framed the issue by employing a number of terms, such as "*ex parte* communication," "witness in a proceeding," and "personal opinion." These characterizations miss the mark. The issue concerns whether this Court's remarks took place in an extrajudicial context or whether they constituted appropriate judicial action. More particularly, may a judge come to the assistance of a fellow judge in a disciplinary proceeding without risking disqualification himself?

To be disqualifying, the alleged bias or prejudice must arise from an extrajudicial source and must result in an opinion "on some basis other than what the judge learned from his participation in the case." *Davis v. Cities Service Oil Co.*, 420 F.2d 1278, 1282, (10th Cir. 1970) (citing *United States v. Grinell Corp.*, 384 U.S. 563, 583, 86 S.Ct. 1698, 16 L.Ed.2d 778 (1966) *See also Smith v. Halford*, 570 F.Supp. 1187, 1189 (D. Kan. 1983)). The Fifth Circuit has held that although a judge's remarks or behavior occur in a judicial context, this does not exclude them from scrutiny if they reflect "such pervasive bias and prejudice as would constitute bias against a party." *Phillips v. Joint Legislative Committee on Performance and Expenditure Review*, 637 F.2d 1014, 1020 n.7 (5th Cir. 1981), *cert. denied sub. nom Mississippi v. Phillips*, 102 S.Ct. 2035 (1982). Counsel for Robins, however, carefully noted at oral argument on the recusal motion that he advanced no allegations of actual bias or prejudice, but that he was concerned only about the appearance of partiality.

The Court believes that the appearance of impartiality is as important as the fact of it, but finds that the question of impartiality cannot be analyzed *ex nihilo*. Thus, the inquiry must be targeted toward whether the Court's action in filing an affidavit in Judge Lord's chastizement proceeding occurred in a judicial or extrajudicial context.

Numerous courts have drawn the distinction between bias that is personal in nature and bias that is judicial, *see, e.g., United States v. Carmichael*, 726 F.2d 158, 160 (4th Cir. 1984), but few have delineated the contrast between judicial and extrajudicial activities. It is clear that a motion for disqualification may not be predicated on a judge's rulings "in the instant case or in related cases, nor on a demonstrated tendency to rule any particular way, nor on a particular judicial leaning or attitude derived from his experience on the bench." *Phillips*, 637 F.2d at 1020. *See also Shaw v. Martin*, 733 F.2d 304, 308

(4th Cir. 1984). Beyond that, the ambit of the judicial context is somewhat murky.

To ascertain the nature of this Court's action in filing an affidavit in a fellow judge's disciplinary proceeding, a fairly unique set of circumstances unaddressed directly by the reported cases, the Court looks to cases focusing upon whether a judge's conduct occurred in a judicial or extrajudicial capacity. During the Watergate prosecutions, the intrepid probing of Judge Sirica led to the revelations of corruption at the highest levels of government. Judge Sirica presented the testimony of a witness which neither party had called, an action approved in *United States v. Liddy*, 509 F.2d 428, 438-42 (D.C. Cir. 1974). He ordered the production of presidential tape recordings, an order upheld in *United States v. Nixon*, 418 U.S. 683 (1974). During sentencing, Judge Sirica indicated that cooperation with the prosecution might result in lighter sentences. *United States v. McCord*, 509 F.2d 334, 347 (D.C. Cir. 1974). Judge Sirica commented to the media that the Watergate defendants could receive as fair a trial in the District of Columbia as in any other federal court in the United States. *United States v. Haldeman*, 559 F.2d 31, 136 (D.C. Cir. 1976), *cert. denied sub. nom Ehrlichman v. United States*, 431 U.S. 933 (1977). In the conspiracy trial of John Mitchell, John Ehrlichman and others, several defendants moved for the recusal of Judge Sirica because of his involvement in so many aspects of the Watergate indictments and prosecutions. Judge Sirica denied recusal on the ground that the allegations showed only prior judicial actions and that no "personal" bias, only "judicial" bias, had been claimed. *United States v. Mitchell*, 377 F. Supp. 1312, 1320 (D.D.C. 1974). The judge's use of his knowledge derived from judicial proceedings in the administration of other such proceedings withstood repeated attacks. Judge Sirica's judicial activism was commended in *McCord*, 509 F.2d at 347:

> "A superficial review of these events might support the inference that at least Judge Sirica communicated an appearance of inquisitional attitude inconsistent with notions of a fair trial. However, such a view assumes an exceedingly narrow interpretation of the responsibilities of a trial judge. . . . The judge, like the prosecutor in this respect, is not a passive bystander in the arena of justice, a spectator at a 'sporting event'; rather, he or she has the most pressing affirmative responsibility to see that justice is done in every case."

In *United States v. Serrano*, 607 F.2d 1145, 1150 (5th Cir. 1979), *cert. denied*, 445 U.S. 965 (1980), the Fifth Circuit upheld Judge Terrell Hodges' denial of a motion to disqualify premised upon his remarks which indicated an intention to impose stiff penalties to curb large scale drug importation: "Reading Judge Hodges' remarks in context clearly demonstrates that any predisposition to sentence volume drug offenders severely stemmed from his observations in a strictly judicial capacity as to the volume of such cases in the courts and the lack of deterrent effect of light sentences for such offenders." The Court acknowledged that acquisition of information in one case could be employed to fashion an opinion in other related cases and held that any impressions formed and acted upon were "judicial rather than personal." *Id.*

Finally, in *Bradley v. Milliken*, 620 F.2d 1143 (6th Cir. 1980), *cert. denied*, 449 U.S. 870 (1981), the Sixth Circuit refused to disqualify Judge Robert DeMascio, of the United States District Court for the Eastern District of Michigan, under section 455(a) on the ground that he met *ex parte* with representatives of a school board in a school desegregation case. The Court held that although Judge DeMascio's actions were "perhaps a bit unorthodox," they constituted "judicial activities designed to ensure a community climate receptive to [the] court's orders." *Id.* at 1157.

In sum, the above cases indicate a tendency on the part of courts to define the ambit of "judicial" activity quite broadly. Actions taken by a court in one case which draw upon the court's experience in prior cases have been held to constitute judicial actions. Furthermore, activities of judges in meeting with the press and with litigants were sanctioned as actions which insured the effective and efficient administration of the courts.

Applying the above precepts, the Court determines that its filing of an affidavit was an action performed in the Court's judicial capacity, rather than an extrajudicial activity. The Court's thoughts were voiced in a judicial setting—before the investigatory panel of the Eighth Circuit Judicial Council—and the informational source upon which they drew—the Court's eight and one-half years of experience in the multidistrict Dalkon litigation—was distinctly judicial.

Furthermore, in a broader sense, the Court's actions went to the heart of the judicial process. The substance of the Court's affidavit in part concerned possible discovery abuses potentially practiced both in the Dalkon cases before Judge Lord and in the instant cases. It is the duty of a trial judge to supervise, manage and control pretrial discovery, "for he is the single individual who, in the exercise of this purely judicial discipline, can do so effectively." *City of Cleveland*, 503 F. Supp. at 375 n.4. In the present matter, it was particularly the province of this Court, in control of over one thousand cases consolidated into multidistrict litigation, to affirmatively exercise this duty and to inquire into and attempt to thwart any perceived abuses of the discovery process.

This Court is charged by Canon 1 of the Code of Judicial Conduct for United States Judges with the obligation to uphold the integrity of the judiciary. It was precisely this critical function that the Court attempted to perform by filing the affidavit: the prevention of any possible fraud from being perpetrated upon the courts. As the

United States Supreme Court stated in *Wood v. Georgia*, 370 U.S. 375, 383 (1962), "[T]he right of courts to conduct their business in an untrammeled way lies at the foundation of our system of government. . . ." The Court finds completely unpersuasive the intimation that it is a demonstration of bias for a judge who has been working on discovery for over eight years to comment on and uncover possible abuses in the proceedings before him. Surely section 455(a) never contemplated crippling the courts.

Regarding Robins' specific concerns, Robins first contends that the appearance of impartiality is threatened by this Court's having stated in the affidavit a "personal opinion" that Robins might be guilty of discovery misconduct and now being called upon to make just such a determination in the current litigation. As explained above, the opinion expressed in the affidavit was particularly judicial. Furthermore, mere prior involvement with an issue cannot disqualify a judge; "otherwise, a judge could never reach the end of a case without being disqualified through exposure to it in earlier stages." *United States v. Wayne County Department of Health-Air Pollution Control Division*, 571 F.Supp. 90, 93 (E.D. Mich. 1983).

In addition, whatever partiality is alleged is simply not the type of partiality prohibited by section 455:

> "While bias or prejudice may spring from many sources, often extrajudicial in their origin, the negative bias or prejudice of the kind alleged here will disqualify only if it is an attitude or state of mind that belies an aversion or hostility of a kind or degree that a fair-minded person could not entirely set aside when judging certain persons or causes. It is an animus more active and deep-rooted than an attitude of disapproval toward certain persons because of their known conduct, unless the attitude is somehow related also to a suspect or invidious

> motive such as racial bias or a dangerous link such as financial interest, and only the slightest indication of the appearance or fact or bias or prejudice from these sources would be sufficient to disqualify."

United States v. Conforte, 624 F.2d 869, 881 (9th Cir. 1980). The affidavit does not address the merits of the present litigation nor does it exhibit any predisposition for or against any party or counsel. In fact, the affidavit specifically stated: "I have always had courteous treatment and high regard for the gentlemanly conduct and representations of Alex Slaughter, lead counsel for Robins, and local counsel, Ron Heck." Affidavit of Frank G. Theis, *In Re Complaint of A. H. Robins Co., Inc.*, JCP 84-001, p. 4 (8th Cir. 1984). There is a salient difference between a judge making observations about proceedings and being prejudiced regarding parties or issues in proceedings. The affidavit exhibits experience; that is not tantamount to partiality.

Finally, of primary importance, a judge's comment is disqualifying "only if it connotes a fixed opinion." *Haldeman*, 559 F.2d at 136. Even the most unfavorable reading of the substance of the affidavit cannot lend any support to the charge of a fixed opinion on the issue of potential discovery abuses. The affidavit spoke only in terms of appearances:

> "The reports . . . *would seem to indicate* that my understanding of the status of document production at the close of the second MDL hearing was inconsistent with the facts as they then existed. . . . [*I*]*t would appear* to me that a great volume of material was numbered for production but not produced. . . . *It would appear to me* that representations made to me concerning the completeness of discovery during the MDL proceedings are open to serious question."

Affidavit, pp. 1-2.

In the affidavit the Court spoke in hedging terms for a specific reason. The Court had not then and has not yet made up its mind regarding potential discovery abuses. Proceedings have been started before this Court to determine whether there exists any semblance of validity to the discovery abuses claimed by plaintiffs. A number of motions are presently on file before this Court concerning allegations of misconduct, such as harboring and the destruction of evidence. The Court has received briefs on these matters and will conduct hearings concerning them: both Robins and plaintiffs will be afforded every opportunity to be heard on these issues. The commands of due process will be fully satisfied before this Court examines the issues and renders a decision on the merits. In litigation of this size, the Court recognizes that a voluminous amount of records are in the fray and that any failure to produce documents may easily be the result of inadvertence. The Court's conduct during the course of these proceedings indicates an abundance of caution in making decisions. The Court *sua sponte* held in abeyance any receipt of evidence on the current discovery motions in MDL 211 pending oral argument, receipt of briefs and resolution of the present recusal motion. Far from indicating an appearance of partiality, the Court's actions exhibit a careful and fair-minded attitude. The affidavit itself suggests the Court's flexibility regarding the satisfaction of discovery orders.

> "Since commencing these proceedings, they have consumed unnumbered days of court time, have lasted over a period of eight and one-half years, and are still ongoing. During this time, thousands of documents had been produced and *I was satisfied that appropriate discovery had been made, that only privileged documents had been withheld, and that all available relevant evidence in the possession of A. H. Robins and its attorneys had been made available to the plaintiffs.* . . .

> In August of 1981, and again in September, 1982, counsel for plaintiffs requested that I reopen these proceedings and represented to me as a reason therefor that certain documentation existed which had not been produced pursuant to my previous discovery orders, and to make video depositions of key Robins officials. *After an evidentiary hearing, I reopened discovery proceedings.* In the course of these proceedings, many additional documents were produced. *At the conclusion of these proceedings, I was again satisfied that all relevant and non-privileged materials had been produced.*"

Affidavit, pp. 1-2 (emphasis added). Any tendency to attribute bias to the language contained in the Court's affidavit is fairly dispelled when the affidavit is read in its entirety and in context.

Next, Robins claims that this Court had *ex parte* communications with Judge Lord and his counsel. Robins' reliance on the notion of *ex parte* communications is misplaced. Communication between two federal judges or between a judge and another judge's counsel is not *ex parte* communication. This Court did receive the reports of the Special Masters, officers of the federal court in Minnesota, copies of which reports were provided to both parties. The Court did not conduct any extrajudicial investigation of the facts surrounding the complaint against Judge Lord.

Regarding the timing of this Court's review of the Special Masters' reports, plaintiffs contend that since they requested this Court to examine the reports of the Special Masters, which reports plaintiffs submitted to the Court on December 11, 1984, before defendant filed the recusal motion on January 10, 1985, that the allegation of *ex parte* conduct is moot. The Court agrees with Robins that the Court must focus its attention on its actions at the time they were undertaken.

Numerous cases have allowed *ex parte* communications and receipt of information to protect the integrity of the judicial process. In *United States v. Phillips*, 664 F.2d at 1003, the Fifth Circuit Court of Appeals held that the trial court was not improperly involved in collateral investigation of alleged plans to disrupt the trial when strike force attorneys contacted the presiding judge and informed him of the plans of certain defendants to flee from the country if bond was not revoked. The Court held that the communications did not require recusal of the judge and noted that any *ex parte* revelations were made to enable the judge to perform his duty to conduct an orderly trial.

Similarly, in *United States v. Jackson*, 430 F.2d 1113 (9th Cir. 1970), the Court held that *ex parte* communication of threats to witnesses was not a basis for disqualification. In *Bradley v. Milliken*, 620 F.2d at 1157, the Sixth Circuit held that a judge's *ex parte* meetings with a school board in developing a desegregation plan did not create an appearance of partiality because the meetings were a judicial activity intended to insure a community climate receptive to the court's orders.

Finally, in *United States v. Mitchell*, 377 F.Supp. at 1322, the Court noted that "[j]udges routinely preview evidence or information bearing on a case in other settings, with no thoughts of disqualification arising as a result." In short, "'[k]nowledge acquired by a judge while he performs judicial duties does not constitute grounds for disqualification.'" *Katsaros v. Cody*, 744 F.2d 270, 283 (2nd Cir. 1984) (quoting *United States v. Coven*, 662 F.2d 162, 168 (2nd Cir. 1981), *cert. denied*, 456 U.S. 916 (1982)).

As discussed above, the Court's actions in the instant case involved the performance of judicial duties. The reports of the Special Masters concerned specifically the same area of discovery which this Court has been shepherding for many years. *If* the claims of Judge Lord

and his experienced Masters were true, in whole or in part, then the basis of his comments, if not his precise choice of procedure and words, had important ramifications in similar litigation pending in federal courts throughout the United States and certainly in this court. The Court's acquaintance with information pertinent to this case has in every instance flowed from judicial sources. To the extent that the receipt of any information could be characterized as *ex parte*, it takes on no pernicious connotation. The information was brought to this judge's attention during the performance of his judicial duties.

Robins characterizes the affidavit as conflicting with the principles underlying 28 U.S.C. § 455(b)(5)(iv), which requires disqualification if a judge is "likely to be a material witness in the proceeding." This judge is unlikely to be called as a witness in the current multidistrict Dalkon litigation. Furthermore, the concerns underpinning this provision are inapposite to the present case. As the case cited in part by Robins, *In Re Continental Vending Machine Corp.*, 543 F.2d 986, 995 (2nd Cir. 1976), goes on to state:

> "The purpose of this provision is to prevent a judge from having to pass on the competence and veracity of his own testimony given with respect to a matter presently in controversy before him. The mere fact that he may have testified with respect to some wholly unrelated matter should not disqualify him (citations omitted), since it does not require him to pass upon the credibility of his own testimony and there is no reason to suppose that his decision might be affected by his unrelated testimony. Were the rule otherwise, a judge in an extended and multisegmented . . . case . . . who has patiently sat on the case for many years, would be forced, for no sound reason, to disqualify himself as to the entire case, leading to wasteful duplication, delay and expense."

The only matter to which the Court affirmatively "testified" was the right of a trial judge to comment on the proceedings before him. Affidavit, p. 5. Furthermore, this Court was a "witness" only in his judicial capacity. *See United States v. Long*, 88 F.R.D. 701, 702 (W.D. Pa. 1981). Finally, the Court will not be required to pass upon the credibility or veracity of its own "testimony" in the instant MDL proceedings, since the affidavit merely said that serious questions concerning discovery abuses were raised in the Dalkon litigation. Long prior to the affidavit submitted by the Court in Judge Lord's disciplinary proceedings, serious questions were raised by plaintiffs in the present litigation regarding possible discovery abuses. Dk. No. 643. The allegation that this Court is "likely to be a witness" in the instant proceedings is without merit.

Robins' final concern is the effect of the affidavit. Robins notes that plaintiffs in other Dalkon cases have cited the affidavit in support of arguments that Robins is guilty of discovery abuses and that the affidavit has been the subject of widespread media publicity. The affidavit should not have been made a matter of public record. Disciplinary proceedings are supposed to be confidential and only at Judge Lord's request did the matter become public.

Robins intimates that because the affidavit became a matter of public record, it is public comment about a pending proceeding, in violation of Canon 3(A)(6) of the Code of Judicial Conduct for United States Judges. Public records are not equivalent to public comment. Otherwise, all opinions would be construed as public comment. Finally, the Court cannot control the use of his affidavit by partisan plaintiffs, nor can the Court muzzle the media. A judge considering whether to disqualify himself must ignore rumors, innuendos and erroneous information published as fact in the newspapers. *In re United States*, 666 F.2d 690, 695 (1st Cir. 1981).

Judicial independence cannot be subservient to public opinion.

Robins' motion for recusal wholly ignores the primary purpose of the Court's affidavit. The affidavit states:

> "I do not believe a judge should be hobbled or censored for good faith remarks he makes with full knowledge of facts and circumstances which appear to him to inhibit the processes of justice and the inherent right of free speech of a judge to prevent possible fraud upon the court.

Affidavit, p. 5.

Many decisions have recognized the power of judges to comment on the evidence in a case and to express opinions. *See, e.g., United States v. Bray*, 546 F.2d at 858; *United States v. Womack*, 454 F.2d 1337, 1342 (5th Cir. 1972), *cert. denied*, 414 U.S. 1025 (1973). A long line of Tenth Circuit cases have upheld even remarks presented in strident terms. *United States v. McKay*, 491 F.2d 616 (10th Cir. 1973), *cert. denied*, 419 U.S. 1047 (1974); *Whitlock v. United States*, 429 F.2d 942 (10th Cir. 1970); *Cooper v. United States*, 403 F.2d 71 (10th Cir. 1968). Judge Lord expressed his views on a particular case; this Court commented on Judge Lord's expression of views.

In addition, this Court was appalled at the procedural treatment of Judge Lord in the filing of a disciplinary proceeding, particularly when the avenue of appeal not only remained open to but was utilized by Robins. Use of such indirect avenues of reproach is antithetical to the proper functioning of the judicial system; its use has a chilling effect on the independence of a federal judge. In *Gardiner v. A. H. Robins*, 747 F.2d 1180, 1190 (8th Cir. 1984), the Eighth Circuit agreed:

> "[T]he propriety of the court's comments is at the heart of a disciplinary proceeding commenced by Robins and its officers against Judge Lord under the

> Judicial Conduct and Disability Act of 1980, 28 U.S.C. § 372 (1982), now pending before the Judicial Council of this circuit. It is far more desirable for this issue to be addressed in the normal appellate process than in the extraordinary context of a disciplinary proceeding."

Ultimately, the Eighth Circuit Judicial Council recognized that Robins' action in filing a disciplinary charge was duplicative of the action taken by appeal. In *In Re Complaint of A. H. Robins*, JCP 84-001 (8th Cir. December 5, 1984), the Judicial Council dismissed the disciplinary complaint as moot because of the action taken by the Eighth Circuit on appeal.

In *Gardiner*, the Eighth Circuit commented upon the proper role of a judge in the administration of justice:

> "The judicial branch of the government is not and should not become an advocate for private causes. A federal district judge holds one of the most powerful and respected offices in this country. The judge exercises a power over a person's life, liberty, and property, legally restrained only by the review processes of a court of appeals and the Supreme Court of the United States.

Gardiner v. A. H. Robins, 747 F.2d at 1194.

This Court fully agrees with the Eighth Circuit's pronouncements regarding the power and the duties of a federal judge and the obligation incumbent upon all federal judges to maintain impartiality. To the extent that Judge Lord overstepped the bounds of propriety and personally assailed Robins' officers, this Court respectfully disagrees with his reprimand. This Court, however, continues to espouse the right of a federal judge to comment on matters before him. The day that a judge cannot comment on the evidence in a case before him, or the applicability of precedential law to the case, will be the day that a free and independent judiciary is dead.

In the instant motion for recusal, Robins attempts to use the result of the *Gardiner* decision to argue that this Court should not have filed an affidavit in support of Judge Lord's practices. Robins appears to be constructing an oblique argument of guilt by association. Merely because the Eighth Circuit ruled adversely to Judge Lord on appeal in no way compels the conclusion that this judge, in a separate chastizement proceeding, should not have supported a fellow judge's right to speak freely. A judge should not be disqualified merely because he believes his brethren have rights under the First Amendment within the confines of the canons of judicial ethics.

In sum, the test for recusal is whether "a reasonable [person] . . . under all the circumstances" would question the judge's impartiality. *United States v. Gigax*, 605 F.2d 507, 511 (10th Cir. 1979). Robins has focused on particular circumstances and has viewed them with a partisan eye. Although the facts surrounding the complaint against Judge Lord and this Court's filing an affidavit in a chastizement proceeding are somewhat unusual, they do not, when examined in their entirety, compel this Court's recusal in the instant case. If this Court were to disqualify in the present case, the precedent set would place the judiciary between Scylla and Charybdis; a judge would be required to choose between protecting the integrity of the judicial process and risking disqualification himself.

IT IS THEREFORE ORDERED that Robins' motion for recusal is hereby denied.

At Wichita, Kansas, this 1st day of February, 1985.

/s/ Frank G. Theis
United States District Judge

APPENDIX C

JUDICIAL COUNCIL OF THE EIGHTH CIRCUIT BEFORE THE INVESTIGATORY COMMITTEE

IN RE: COMPLAINT OF A. H. ROBINS COMPANY, INCORPORATED
JCP 84-001

IN RE: COMPLAINT OF E. CLAIBORNE ROBINS, JR., *et al.*
JCP 84-002

AFFIDAVIT

STATE OF KANSAS)
) SS:
COUNTY OF SEDGWICK)

FRANK G. THEIS, being duly sworn, states as follows:

1. I have presided since December 10, 1975, over the multidistrict litigation proceedings covering over a thousand federal cases and several hundred tagalong state cases involving the Dalkon Shield, a birth control device manufactured by the A. H. Robins Company.

2. The object and purpose of these multidistrict proceedings was to coordinate nationwide discovery on the generic aspects of product liability of Robins and to avoid duplication and disparate requests and responses. It was my intention to effectively complete all document discovery and depositions so that a trial package could be available containing all relevant and admissible evidence.

3. Since commencing these proceedings they have consumed unnumbered days of court time, have lasted over a period of eight and one-half years, and are still ongoing. During this time thousands of documents had been produced and I was satisfied that appropriate discovery had been made, that only privileged documents had been withheld, and that all available relevant evidence in the possession of A. H. Robins and its attorneys had been made available to the plaintiffs. A multipage docket sheet is attached hereto showing affiant's exposure to the MDL cases.

4. In August of 1981, and again in September, 1982, counsel for plaintiffs requested that I reopen these proceedings and represented to me as a reason therefor that certain documentation existed which had not been produced pursuant to my previous discovery orders, and to make video depositions of testimony of key Robins' officials. After an evidentiary hearing I reopened discovery proceedings. In the course of these productions many additional documents were produced. At the conclusion of these proceedings I was again satisfied that all relevant and nonprivileged materials had been produced. This was likewise the apprehension of plaintiffs' counsel.

5. I have been furnished by counsel for Chief Judge Miles W. Lord the reports of Special Masters appointed by him to aid in the document production at the corporate offices of A. H. Robins and at the offices of its attorneys. There are certain aspects of these reports which are of particular significance to me in the light of my previous experience in this matter and the prior representations and assurances by Robins' counsel to both plaintiffs' lead counsel and to me that discovery had been completed. The reports of Masters Thompson and Bartsh contain information which would seem to indicate that my understanding of the status of document production at the close of the second MDL hearing was inconsistent with the facts as they then existed. Specifically, the

Masters' reports indicate that the production ordered by Judge Lord "required the production of thousands of documents which had not been previously produced." This appears to be contrary to the representations made to me by counsel for A. H. Robins.

6. During the MDL proceedings, a great deal of time and effort was consumed attempting to establish the extent to which Robins' officials, and particularly its medical department, had knowledge concerning the dangerous propensities of the Dalkon Shield. Insofar as I can recall, there was a paucity of information concerning adverse reaction reports by physicians and patients. In Master Thompson's report, he makes reference to one box labeled nonresponsive by A. H. Robins. Upon examination of these documents, Master Thompson found them to be responsive. These documents, marked nonresponsive, were the focal point of much of the document discovery effort before me. Their existence and contents would, I believe, be relevant, cogent and critical evidence bearing upon defendant's knowledge and the issue of punitive damages.

7. Without the necessity of comparing document by document what was or was not produced, it would appear to me that a great volume of material was numbered for production but not produced, and that thousands of other documents were neither numbered, reviewed for relevance or privilege, nor produced. It would appear to me that representations made to me concerning the completeness of discovery during the MDL proceedings are open to serious question. While there may possibly be explanations and justifications, this does not appear in any of the materials that have been furnished to me. It would seem, in the light of the disclosures by the Masters, that serious questions exist as to whether or not counsel who appeared before me, or their client, should be disciplined under Rule 16.

8. Further, it appears to me—in the light of the background of the cases before me, a review of Judge Lord's

February 8, 1984 discovery order and the information which was available to him through the Masters—that Judge Lord was mandated under Rule 16 to take some action to vindicate the power of the Court and to maintain the integrity of the discovery process. I have always had courteous treatment and high regard for the gentlemanly conduct and representations of Alex Slaughter, lead counsel for Robins, and local counsel, Ron Heck. As stated previously, however, I have had to spend much time on adversarial hearings whose necessity was not always apparent, other than delay. Likewise, the long experience of sitting on the video depositions in the discovery, acquainted me with a pattern of repetitive and dilatory tactics which I frowned upon, and later made evidentiary rulings upon, to expedite the course of the many Dalkon Shield cases by eliminating repetitive objections in the many federal trial courts in which the cases were and are still pending. The frustrations and confusion which I have at times experienced in the eight years I have been shepherding this discovery appear to have been part of a pattern of that which occurred before Judge Lord. I do not believe a judge should be hobbled or censored for good faith remarks he makes with full knowledge of facts and circumstances which appear to him to inhibit the processes of justice and the inherent right of free speech of a judge to prevent possible fraud upon the court. Without knowing all of the details it appears that under the circumstances known, Judge Lord's remonstrance to the responsible company officials was mild punishment indeed considering the strong possibility that such apparent misrepresentations and trial

tactics seem to permeate the proceedings here and elsewhere.

/s/ Frank G. Theis
FRANK G. THEIS

Subscribed and sworn to before me
this 3rd day of July, 1984.

/s/ Helen J. Shepherd
HELEN J. SHEPHERD
Notary Public
State of Kansas

My Appt. Expires July 30, 1986

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Docket No. 211
"All Cases"

IN RE: A. H. ROBINS COMPANY, INC.,
"DALKON SHIELD" IUD
PRODUCTS LIABILITY LITIGATION

MOTION FOR APPOINTMENT OF SPECIAL MASTERS TO SUPERVISE DOCUMENT DISCOVERY; FOR SUPERVISED VIDEOTAPE DEPOSITIONS; AND FOR SANCTIONS AGAINST DEFENDANT ROBINS

COME NOW the plaintiffs by lead and liaison counsel and move the Court for orders as follows:

1. Appointing Peter Thompson and Thomas Bartsh as special masters to supervise the production of all documents set forth in Chief Judge Miles W. Lord's order of February 8, 1984, and this Court's order of May 21, 1984, (Exhibits A and B); providing for all costs and expenses to be paid by defendant; designating Judge Robert G. Renner to determine any issues of privilege which arise during such production in accordance with an existing order in the United States District Court for the District of Minnesota; and ordering that a copy of all documents produced be forwarded to plaintiffs' lead

counsel in Wichita, Kansas, for placement in the MDL-211 document depository.

2. Directing defendant to produce in Wichita, Kansas, for videotape depositions at its expense the following persons: W. Roy Smith; Lester W. Preston, Jr.; E. C. Robins, Jr.; William A. Forrest, Jr.; Patricia Lashley; and such other agents or employees as may be necessary to complete discovery.

3. Ordering defendant to pay as sanctions an amount sufficient to refund all lead and liaison counsel fees previously paid and to pay additional attorney fees, costs, and expenses of plaintiffs' lead and liaison counsel and his designees, pursuant to Rule 37, Fed.R.Civ.P., and 28 U.S.C. § 1927.

4. Striking defendant Robins' affirmative defense of the statute of limitations and prohibiting defendant from presenting evidence in support of such defense, pursuant to Rule 37(b)(2)(B) and (C).

5. Ordering defendant to appear and show cause why it should not be held in contempt of court for withholding and destroying documents, pursuant to Rule 37(b)(2)(D).

Plaintiffs' motion is based on the accompanying memorandum with attached exhibits, the Federal Rules of Civil Procedure, and the orders, depositions, and exhibits filed in this action and those filed in *Bonlender v. Robins*, No. 3-80-341 (D. Minn., July 30, 1984) and *In Re: Dalkon Shield Litigation, Abeln, et al v. Robins*, Hennepin Co. Dist. Ct., Minn.

POST, SYRIOS & BRADSHAW

By /s/ Bradley Post
BRADLEY POST
Lead and Liaison Counsel
for Plaintiffs

NOTICE OF HEARING

The above matter shall come on for hearing before the Honorable Frank G. Theis on January 10, 1985, at 1:00 p.m., or as soon thereafter as the parties may be heard.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the above and foregoing motion was mailed, postage prepaid, to the following on the 13th December, 1984:

Alexander H. Slaughter
McGuire, Woods & Battle
1400 Ross Building
Richmond, Virginia 23219
Lead and Liaison Counsel
for Defendant Robins

/s/ Bradley Post
BRADLEY POST

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Docket No. 211
"All Cases"

IN RE: A. H. ROBINS COMPANY, INC.,
"DALKON SHIELD" IUD
PRODUCTS LIABILITY LITIGATION

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR APPOINTMENT OF SPECIAL MASTERS AND FOR SANCTIONS

All Dalkon Shield cases were ordered consolidated under the above caption by the Judicial Panel on Multidistrict Litigation on December 8, 1975, and were thereafter transferred to Kansas with the consent and subject to the supervision of this Court. After the appointment of lead and liaison counsel for the parties and a series of hearings, this Court issued its order on June 8, 1976, for the production of all documents pertaining in any way to the Dalkon Shield. (Exhibit 1) Thereafter, documents were produced and numerous depositions were taken. This Court issued its orders updating the production of documents on August 19, 1981, and November 29, 1982. (Exhibits 2 and 3) On February 8, 1984, Chief Judge Miles W. Lord of the United States District Court for the District of Minnesota discovered that documents had been withheld and issued his order for production. (Exhibit 4) This Court thereafter issued an order for production of the same documents on May 21, 1984. (Ex-

hibit 5) Some documents have been produced pursuant to said orders. The defendant claims privilege on numerous additional documents. Peter Thompson and Thomas Bartsh have previously been appointed as Special Masters to supervise the production of documents by the United States District Court for the District of Minnesota. Their work is subject to the supervision of the Honorable Robert G. Renner. They are prepared to proceed to review all documents and determine questions of privilege. If disputes arise concerning the privilege issue on any of the documents produced, these will be determined by Judge Renner. This Court should nominate and appoint the same masters to continue supervising the production of documents and Judge Renner to rule on privilege issues. All costs should be assessed against defendant, for reasons hereafter set forth.

Roger L. Tuttle was previously in-house counsel and attorney in charge of litigation for defendant Robins. His employment extended from April, 1971, until April, 1976. His deposition was taken in this litigation on March 7-8, 1977, in Danville, Virginia. This Court designated the Honorable James C. Turk to supervise that deposition. Mr. Tuttle recently gave additional deposition testimony before Magistrate Earl Cudd in the United States District Court for the District of Minnesota. At that time, he testified that following trial of the case of *Deemer v. Robins*, Nos. C-26420 and C-30649, Sedgwick Co. Dist. Ct., Kan., he was instructed to search for sensitive documents and see that they were destroyed. A portion of that testimony is attached as Exhibit 6. Attached to Mr. Tuttle's deposition were a number of documents, some of which were originals which were never produced for inspection and copying in these proceedings, in direct violation of this Court's orders. The exhibits which were never produced included deposition exhibit 10. This is a key document and was clearly covered by orders for production. During the taking of MDL depo-

sition testimony, hundreds of pages of testimony were devoted to the purpose of copper in the Dalkon Shield and whether or not the device was improperly classified as "inert" based on information submitted by Robins to the United States Food and Drug Administration. The document authored by officer W. Roy Smith (Exhibit 7), was crucial to successful discovery on the copper issue and was deliberately and wrongfully withheld. The document was relevant to deposition testimony given by virtually every Robins employee. Mr. Smith gave false and misleading testimony concerning the exhibit.

During consolidated proceedings in Minnesota, a Robins employee, Patricia Lashley, a legal assistant to William A. Forrest, Robins' vice president and general counsel, testified concerning certain notes she took of an important meeting that occurred on February 17, 1975. During the course of the deposition, Ms. Lashley admitted her notes were now missing and no longer available. They were never produced in compliance with the orders for production issued by this Court and have apparently been destroyed.

A motion for sanctions was filed in the case of *Bonlender v. Robins*, et al, *supra*. A hearing was held on that motion before Magistrate Patrick McNulty. Before the issues were decided, all of the cases being handled by the attorneys representing *Bonlender*, et al, were settled for the sum of $38 million. Many of the same issues raised in *Bonlender* are involved in these proceedings. A copy of the motion and brief of plaintiffs are attached as Exhibit 8.

It is necessary and advisable that the additional document discovery ordered in Minnesota go forward. Exhibit 9 was produced as a direct result of the order of Judge Lord. It shows the defendant delegated to the firm of McGuire, Woods & Battle the duty to monitor adverse reactions. The testimony of Dr. Ellen Preston shows that the law firm continued as product monitor at

least until August 22, 1984. (Exhibit 10) Exhibits 9 and 10 make it imperative that the work of the masters proceed. Since defendant's misconduct required the appointment of the masters and it has withheld and destroyed sensitive documents, it should be required to pay all costs of additional document production.

Because defendant wrongfully withheld key documents and delayed recall of the device, it is now necessary to take additional videotaped depositions. Since the necessity for these depositions resulted from wrongful conduct, defendant should be ordered to produce the witnesses in Wichita, Kansas, and pay all costs, attorney fees, and expenses which result.

Additional sanctions should be levied against defendant as requested in plaintiffs' motion.

Respectfully submitted,

POST, SYRIOS & BRADSHAW

By /s/ Bradley Post
BRADLEY POST

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing memorandum was mailed, postage prepaid, to the following on the 13th day of December, 1984.

Alexander H. Slaughter
McGuire, Woods & Battle
1400 Ross Building
Richmond, VA 23219

/s/ Bradley Post
BRADLEY POST

APPENDIX E

UNITED STATES COURT OF APPEALS JUDICIAL COUNCIL FOR THE EIGHTH DISTRICT

IN RE: COMPLAINT OF A. H. ROBINS COMPANY, INCORPORATED
JCP 84-001

IN RE: COMPLAINT OF E. CLAIBORNE ROBINS, JR., *et al.*
JCP 84-002

TRANSCRIPT OF PROCEEDINGS
VOLUME I

A hearing before the Special Investigative Committee of the Judicial Council was hereby commenced at 9:30 o'clock a.m., Monday, July 9, 1984, at the Federal Courthouse, in St. Paul, Minnesota.

[2]
APPEARANCES:

ON BEHALF OF THE COMPLAINANTS

Griffin B. Bell
2500 Trust Company Tower
Atlanta, Georgia 30303

-and-

Charles H. Kirbo

-and-

James D. Miller
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ON BEHALF OF THE RESPONDENT

Ramsey Clark
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-and-

Joe A. Walters
3800 IDS Tower
Minneapolis, Minnesota

* * * *

[81] MR. BELL: With the court?

MR. WALTERS: With the clerk of courts, yes, here in St. Paul.

MR. BELL: Yeah.

MR. WALTERS: I believe that——

MR. BELL: What case were they filed in?

MR. WALTERS: I believe they were filed in the cases being supervised by Judge Renner.

MR. BELL: Some other case, is that——

MR. WALTERS: Judge Renner's cases. I think you'll find them there.

MR. BELL: Thank you. Now, with relation to Judge Theis.

MR. WALTERS: Yes.

MR. BELL: You've got this affidavit from him, and he's—somebody showed him these Masters' reports?

MR. WALTERS: Yes.

MR. BELL: Did you give us any notice that you were going to contact Judge Theis and let us have someone to respond to these reports?

MR. WALTERS: No, Judge Bell, I did not give any notice that I was in contact with Judge Theis.

MR. BELL: Are you the person who contacted Judge Theis?

MR. WALTERS: Yes, I'm the person who [82] contacted Judge Theis.

MR. BELL: And you showed him these Masters' reports?

MR. WALTERS: I think I sent them down to him.

MR. BELL: And what else did you show him? Did you show him Judge Lord's statements?

MR. WALTERS: My recollection is a copy of the statement.

MR. BELL: But you didn't notify us that you were going that course?

MR. WALTERS: No.

MR. BELL: You didn't consider that going to court, I suppose?

MR. WALTERS: Well, I think that I didn't receive, just like my client never received any notice, Judge Bell, that you were filing a complaint on behalf of your clients with the chief judge of the Eighth Circuit here. We never had an opportunity there to question these arbitrary statements that were made in the complaints, many of which weren't correct, and can't be grounded on facts. This was an ex-parte proceeding that you had with the chief judge of this court, and we weren't given an opportunity to have any contact until after you had made your——

JUDGE SACHS: I think the record has [83] sufficiently been made, counsel.

MR. BELL: Well, I would like to say, Your Honor, I never contacted the chief judge, I have no idea what he's talking about.

MR. WALTERS: Somebody's filed these complaints.

MR. BELL: I filed it by mail.

MR. WALTERS: You never told us you were filing it, you never gave us an opportunity to see it before it was filed, you never gave us an opportunity to correct the statements.

MR. BELL: We filed by the rules of the Eighth Circuit. That's all I can say about that. Let me say just one other thing. (pause) That's enough.

JUDGE LAY: Gentlemen, I'd like to ask one question. It's not clear in my mind. The overlapping, if there

is any, between the appeal that's filed, and I'm fully briefed in our court and the proceedings going on here as it relates to the settlement document, and perhaps the two of you can consult and give us somewhat of a stipulated statement on that this afternoon, but I think that would be helpful to us to understand if there is an overlap. We haven't had a chance to study those briefs. We've just received them, but it does appear there is some connection.

MR. BELL: We'll try to get together on that.

* * * *

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE DISTRICT OF KANSAS

Civil Docket Number MDL-211
ALL CASES

IN RE: A. H. ROBINS COMPANY, INC.,
DALKON SHIELD IUD PRODUCTS
LIABILITY LITIGATION

Wichita, Kansas
July 20, 1984

TRANSCRIPT OF STATUS CONFERENCE BEFORE
THE HONORABLE FRANK G. THEIS

APPEARANCES:

FOR THE PLAINTIFFS:

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Mr. Arden J. Bradshaw
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Wichita, Kansas 67202

FOR THE DEFENDANTS:

Mr. Alexander H. Slaughter
Mr. Gilbert Schill
Ms. Cindy Hendren
1400 Ross Building
Richmond, Virginia 23219

Mr. Ronald D. Heck
Post Office Box 1677
Topeka, Kansas 66601

[29] THE COURT: Well, certainly anybody that, I mean, of course, he can't do it by himself—they haven't been operating that way—and I think you would be, ought to have a written designation or telephone designation, something like that that you can rely on that keeps you from having all the plaintiffs' lawyers—like I say, you wouldn't want that because first they're not familiar with the overall aspect of the litigation, like presumably Brad is, and Manchester, and a few of the others—I forget the names of some of yours—

MR. POST: Mr. Bragg, and Mr. Bradshaw, and others.

THE COURT: Yes. But, I think that ought to be done. Well, that is fine with me. I hope you work it out. I'm not looking for trouble, unnecessarily, believe me.

MR. SLAUGHTER: All right. I think—one other aspect about the affidavit, your Honor: I would like to go ahead and, as quickly as we can, move as quickly as Mr. Post always does, to get these things resolved, because the affidavit itself is damaging to us, as the Court knows. You have been handling it for eight or nine years—and we respect the Court and would always look at what the Court ruled, and so therefore the affidavit, you know, here, it appears, although it is not a ruling, and we won't have a ruling for awhile that there were no documents—

THE COURT: No, we can't make any ruling until we're here. If the statements are erroneous, I would like to clear them up.

[30] MR. SLAUGHTER: Thank you, your Honor. That is all.

THE COURT: But, my apprehensions, from reading the—as I said, I read that affidavit, too. It was couched in what I call weasel words, in a way. If you're not sure of something, you qualify about it "it appears to me", and so forth, and it certainly gave a strong appearance to me, and that was my reaction, that somebody had been pulling the wool over my eyes, and, as I said, if I—

I still feel that way—if I found that it had been done willfully, I would feel like some contempt charges ought to be made. Otherwise, I understand that this is a big operation and nothing is perfect. I mean, you can certainly overlook some things by inadvertence, and otherwise.

MR. SLAUGHTER: But, I think if the Court will look—

THE COURT: I never had any reason to doubt your assertions.

MR. SLAUGHTER: Thank you. As I say, I think ultimately, like this thing with the box, it basically was a misunderstanding, it was a box of documents that had in fact been produced, and I think, we know, were in our files in Richmond, and in the court's files, and we will find them here in Wichita because they were important documents that Mr. Post would have picked-out and brought. Since they had those early numbers on them they were obviously in the file at that time.

MR. POST: But, there are—excuse me—there are other documents, as I said, that I've gotten, and they're not,

* * * *

Office - Supreme Court, U.S.
FILED
MAY 15 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1624

In The
Supreme Court of the United States
October Term, 1984

A. H. ROBINS COMPANY, INCORPORATED,
Petitioner,

v.

HONORABLE FRANK G. THEIS,
Judge of the United States District Court
for the District of Kansas,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does 28 U.S.C. § 455(a) require disqualification of a United States district judge with long experience in supervising the Dalkon Shield IUD multidistrict proceedings who submits an affidavit to assist the Judicial Council for the Eighth Circuit in a disciplinary proceeding brought by petitioner A. H. Robins Company, Inc. against another district judge?

PARTIES IN THE TENTH CIRCUIT

A.H. Robins "Dalkon Shield" IUD Products Liability Litigation

A.H. Robins Company, Incorporated

The Honorable Frank G. Theis, United States District Judge For The District of Kansas

Note: Counsel for plaintiffs in the multidistrict proceedings pending in the District of Kansas designated MDL-211 opposed the petition for writ of mandamus addressed to the Tenth Circuit and appear as respondents before this Court to oppose the petition for writ of certiorari.

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No. 84-1624

In The

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October Term, 1984

A. H. ROBINS COMPANY, INCORPORATED,

Petitioner,

v.

HONORABLE FRANK G. THEIS,
Judge of the United States District Court
for the District of Kansas,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The unreported Order of the Tenth Circuit dated March 15, 1985, denying the petition of A.H. Robins Company, Incorporated for a writ of mandamus appears as Appendix A to petitioner's brief.

The Opinion and Order of Judge Frank G. Theis of the District of Kansas dated February 1, 1985, denying petitioner's motion to disqualify is also unreported and appears as Appendix B to petitioner's brief.

JURISDICTION

Respondents agree with petitioner's statement of jurisdiction.

STATEMENT OF THE CASE

Since 1970 when petitioner A.H. Robins Company, Incorporated first marketed the Dalkon Shield intrauterine contraceptive device, more than 10,000 women from the United States and abroad have made claims against petitioner and other defendants for pelvic infection, sterility, septic abortion, and in some instances death caused by the device. Following the appointment in 1975 of Judge Frank G. Theis of the District of Kansas as the multidistrict litigation transferee judge, extensive pre-trial discovery and preparation of the federal Dalkon Shield cases have been conducted in multidistrict proceedings designated MDL-211 and captioned *In Re: A.H. Robins Company, Inc. "Dalkon Shield" IUD Products Liability Litigation.*

On January 10, 1985, petitioner moved to disqualify Judge Theis from further participation in MDL-211. In an Opinion and Order dated February 1, 1985, Judge Theis denied this motion. Judge Theis' decision is set out as petitioner's Appendix B. Thereafter petitioner sought a writ of mandamus from the United States Court of Appeals for the Tenth Circuit compelling recusal of Judge Theis. By Order dated March 15, 1985, the Tenth Circuit denied the petition for mandamus without opinion. Petitioner now seeks a writ of certiorari to obtain review of the denial of the petition for mandamus.

Other actions taken by petitioner establish the context for its motion to disqualify and the petition for mandamus. On October 22, 1984, petitioner filed a motion for class action certification of all Dalkon Shield punitive damage claims in an action pending in the Eastern District of Virginia. *In re: Dalkon Shield Punitive Damages*

Litigation, Civil Action No. 84-0884-R (E.D.Va.). On January 18, 1985, petitioner filed a motion before the Judicial Panel on Multidistrict Litigation to transfer the multidistrict proceedings from the District of Kansas to the Eastern District of Virginia. At present the class action and transfer motions are still pending and pre-trial proceedings before Judge Theis in MDL-211 are continuing.

The petition for mandamus arose out of an affidavit which Judge Theis submitted in July 1984 to the Judicial Council of the Eighth Circuit in connection with charges of judicial misconduct brought by petitioner and certain of its officers and employees against Chief Judge Miles W. Lord of the District of Minnesota. The text of the affidavit is set forth in petitioner's Appendix C. Petitioner's charges involved oral remarks and other actions taken by Judge Lord in connection with the settlement of a group of Dalkon Shield cases then pending in the District of Minnesota. These proceedings terminated without a decision following a ruling favorable to petitioner in its simultaneous direct appeal to the Eighth Circuit. *Gardiner v. A.H. Robins Co.*, 747 F.2d 1180 (8th Cir. 1984). Judge Lord described some of the difficulties he experienced in obtaining full discovery from petitioner in *Dean v. A.H. Robins Co.*, 101 F.R.D. 21 (D.Minn. 1984).

In his affidavit, Judge Theis outlined the history and purpose of the multidistrict proceedings. He advised the Judicial Panel that he had reviewed reports prepared by the Special Masters supervising discovery in cases pending before Judge Lord in the District of Minnesota. Judge Theis concluded that on the basis of these reports "[i]t would appear to me that representations made to me con-

cerning the completeness of discovery during the MDL proceedings are open to serious question. While there may possibly be explanations and justifications, this does not appear in any of the materials that have been furnished to me." Theis Affidavit, para. 7, Petitioner's Appendix C, p. 22a.

The affidavit concludes with some observations about the petitioner's repeated use of dilatory tactics to obstruct the MDL discovery proceedings and about the role of the federal judiciary in speaking out against any inhibition of the judicial process. "The frustrations and confusion which I have at times experienced in the eight years I have been shepherding this discovery appear to have been part of a pattern of that which occurred before Judge Lord. I do not believe a judge should be hobbled or censored for good faith remarks he makes with full knowledge of facts and circumstances which appear to him to inhibit the processes of justice and the inherent right of free speech of a judge to prevent possible fraud upon the court." Theis Affidavit, para. 8, Petitioner's Appendix C, p. 23a.

Charges concerning the withholding of documents and other alleged discovery abuses for which petitioner is responsible are presently before Judge Theis. On December 13, 1984, MDL-211 plaintiffs filed a motion for sanctions against petitioner. In an initial ruling dated April 8, 1985, Judge Theis ruled that plaintiffs had established a prima facie showing sufficient to meet the crime or fraud exception to the attorney-client privilege. A copy of this decision is attached hereto as Appendix A. Further investigation into these issues is currently taking place in the MDL-211 proceedings.

REASONS FOR DENYING THE WRIT

I. No Basis Exists For A Grant Of Certiorari In This Case.

Petitioner rests its petition on the authority of this Court under Rule 17.1(a) of the Rules of the Supreme Court to review cases in which the Court of Appeals has "so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision." The Court has traditionally exercised its supervisory power to guide the lower courts on issues of general application and significance. See *Hagans v. Lavine*, 415 U.S. 528, 94 S.Ct. 1372, 39 L.Ed. 2d 577 (1974) (application of doctrine of pendent jurisdiction); *Zahn v. International Paper Co.*, 414 U.S. 291, 94 S.Ct. 505, 38 L.Ed.2d 511 (1973) (amount in controversy requirement in class actions) and *Hickman v. Taylor*, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947) (definition of attorney work-product rule in discovery).

The Court's supervisory authority has never required it to intervene whenever a party alleges error by the trial judge in the course of pre-trial proceedings. A mandamus petition or appeal to the Court of Appeals provides the proper setting for the final resolution of interlocutory disputes. That the Tenth Circuit panel which denied petitioner's mandamus petition saw no reason to issue a written opinion weighs heavily against the grant of certiorari.

While the present petition arises out of a unique factual setting, it raises no unusual legal issues. The interpretation of the statute involved, 28 U.S.C. § 455(a), is not in dispute among the circuits and the law con-

cerning judicial disqualification is not otherwise in question. Since the Tenth Circuit wrote no opinion, its decision carries no precedential weight. Petitioner seeks nothing more than a factual determination by this Court of whether under all the circumstances of this case, the district judge acted *reasonably* in denying petitioner's motion to disqualify. This Court has consistently denied certiorari in cases of this nature in which the issues are factual and the legal standard one of judicial discretion.

II. No Grounds Are Present For The Disqualification Of Judge Theis.

From the outset, petitioner has based its motion to disqualify Judge Theis solely on an alleged *appearance* of bias. It has specifically refrained from any claim of actual bias. The issue which petitioner seeks to bring before this Court, therefore, is whether the assistance lent by Judge Theis to the Judicial Council for the Eighth Circuit creates an appearance of impropriety sufficient to bar him from further participation in MDL-211. Judge Theis rejected this argument as, of course, did the Tenth Circuit in summarily denying the petition for a writ of mandamus.

Whether the decision of the Tenth Circuit is correct turns entirely on an understanding of the facts. In enacting 28 U.S.C. § 455(a) in its present form, Congress imposed a standard of reasonableness to be applied through the exercise of the discretion of the trial judge. "Disqualification for lack of impartiality must have a *reasonable* basis." H. Rep. No. 1453, 93d Cong., 2d Ses., reprinted in 1974 U.S. Code Cong. & Admin. News 6351, 6355 (emphasis in original). Since ruling on a disquali-

fication motion calls for the exercise of judgment and discretion at the trial level, appellate review is limited in scope. "The issue of disqualification [on appeal] is a sensitive question of assessing all the facts and circumstances in order to determine whether the failure to disqualify was an abuse of sound judicial discretion." H. Rep. No. 1453, 93d Cong., 2d Ses., reprinted in 1974 U.S. Code Cong. & Admin. News 6351, 6355.

The facts of this case give rise to no reasonable apprehension of bias. As Judge Theis' affidavit demonstrates, he shared with the members of the Judicial Council his views of petitioner's conduct in order to explain the frustration which he and evidently Judge Lord had experienced in supervising discovery in the Dalkon Shield litigation. Judge Theis expressed no final conclusions on this subject and left the door open for any explanation petitioner might have for its conduct. The continuing multidistrict proceedings provide petitioner with every opportunity to rebut or alter the conclusions tentatively expressed in the Theis affidavit.

To provide grounds for disqualification the bias alleged must be personal—not judicial—in origin. This Court has long recognized that views formed in the course of judicial proceedings are not sufficient for mandatory recusal. "The alleged bias and prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." *United States v. Grinnell Corp.*, 384 U.S. 563, 583, 86 S.Ct. 1698, 16 L.Ed.2d 778 (1966).

Facts learned by the court in the course of a different proceeding do not require disqualification. In *United*

States v. Coven, 662 F.2d 162, 168 (2d Cir. 1981), *cert. denied*, 456 U.S. 916, 102 S.Ct. 1771, 72 L.Ed.2d 176 (1982), the Second Circuit wrote that "[k]nowledge acquired by the judge while he performs judicial duties does not constitute grounds for disqualification." The Second Circuit noted that the judicial source of such information tended to dispel any appearance of impropriety under section 455(a). *Coven*, 662 F.2d at 168. See also *Katsaros v. Cody*, 744 F.2d 270, 283 (2d Cir.), *cert. denied*, — U.S. —, 105 S.Ct. 565, — L.Ed.2d — (1984). The views which Judge Theis expressed are strictly judicial in origin and accordingly provide no grounds for disqualification. They stem from his experience in the multidistrict litigation and the difficulties he experienced in obtaining full disclosure from petitioner in discovery.

In an effort to inflate this case to proportions sufficient to justify the grant of certiorari, petitioner raises claims of *ex parte* contact. Judge Theis' so-called *ex parte* communications consist of a conversation with Judge Lord's counsel in the disciplinary proceedings and the review of Special Masters' reports prepared for the District of Minnesota. See Theis opinion denying disqualification, Petitioner's Appendix B, p. 13a. Receipt of the Special Masters' reports can hardly be characterized as an extrajudicial contact. The reports (like the initial telephone contact) did not come from any party to the litigation pending before Judge Theis. The reports were prepared in the context of an adversarial proceeding and were available to petitioner and the other parties in the case.

Petitioner seeks to characterize Judge Theis' role in the Eighth Circuit disciplinary proceedings as non-

judicial in nature. Nothing could be further from the truth. In his affidavit, Judge Theis spoke as a district judge in support and explanation of the conduct of a fellow judge who had experienced similar problems in dealing with petitioner in related litigation. The affidavit draws on Judge Theis' experience in the multidistrict litigation and is not personal or extrajudicial either in its motivation or in the factual basis for the views expressed.

Judge Theis breached no provision of the Code of Judicial Conduct. As the commentary to Canon 3 makes clear, contact between judges is not restricted. Code of Judicial Conduct, 69 F.R.D. 273, 275-76 (1975). By obvious analogy, findings of the designated Masters of other district courts may be reviewed without criticism. Judge Theis hardly engaged in "public comment" within the meaning of Canon 6. His affidavit, submitted solely to aid in the deliberations of the Eighth Circuit, found its way into the public record but not through any action by Judge Theis.

This case turns entirely on a discretionary judgment by the district court first, that his experience in the multidistrict litigation was of sufficient significance to the disciplinary proceedings pending before the Eighth Circuit, to require the submission of an affidavit and second, that submission of the affidavit did not subsequently require his disqualification. Such a case has not arisen before in the reported decisions and is not likely to recur. Petitioner failed to persuade either Judge Theis or the Tenth Circuit that the affidavit provided grounds for recusal and no public purpose would be served by the intervention of this Court in such a case.

CONCLUSION

The Respondents request that this Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

IN RE: A. H. ROBINS COMPANY, INC.,
"DALKON SHIELD" IUD
PRODUCTS LIABILITY LITIGATION

OPINION AND ORDER

The case is currently before the Court on plaintiffs' motion to compel production of five memoranda ("the Burke memoranda") and on plaintiffs' oral motion to incorporate an order issued by Magistrate John B. Wooley ("the Wooley Order") in *Goss et al v. A. H. Robins,* No. 81-1285, into the instant action. Defendant A.H. Robins contends that the Burke memoranda are protected by the attorney-client privilege and the work product doctrine. The memoranda, dated between 1976 and 1980, were addressed to regional, divisional and district managers and sales representatives of Robins and concerned the Dalkon Shield litigation. Robins notes that four of the memoranda were drafted by or under the supervision of attorneys retained or employed by Robins for the signature of John L. Burke, at that time the Robins Vice President to whom the recipients of the memoranda reported. The fifth memoranda was drafted under the supervision of Robins' general counsel, William A. Forrest, Jr., and bears both his and Burke's signatures. Robins claims that all five memoranda request information needed by counsel to defend Robins in litigation.

Plaintiffs initially argued that the memoranda are not protected from discovery because Burke is a sales

representative and not a lawyer. Plaintiffs extended their argument to contend that if the memoranda are subject to the attorney-client privilege or the work product doctrine, then the crime or fraud exception applies and makes the memoranda discoverable. Dk. no. 762. Thus, the issue of application of the crime or fraud exception is presently pending in the MDL.

The same five memoranda were the subject of discovery in five non-MDL cases, *Goss et al.* The parties argued the issue of discoverability before Magistrate Wooley, who issued an order on January 28, 1985, holding that the documents were discoverable under the crime or fraud exception. Plaintiffs have moved to incorporate the Wooley Order into the instant case. Because the Court is considering the same issue anew in the motion to compel, the motion to adopt the Wooley Order by reference shall be denied as repetitious.

The initial issue is whether to apply state or federal law to the attorney-client privilege and work product doctrine issues. Regarding privileges, Federal Rule of Evidence 501 directs the Court to apply the relevant state law. With respect to the work product doctrine, the Federal Rules of Civil Procedure are controlling. *Hanna v. Plumer,* 380 U.S. 460, 471 (1965).

Since Robins seeks to assert the attorney-client privilege and the work product doctrine as bars to discovery, it has the burden of establishing that they are applicable. *BarclaysAmerican Corp. v. Kane,* 746 F.2d 653, 656 (10th Cir. 1984). Robins has submitted the Burke memoranda for *in camera* inspection. Robins argues that the memoranda in question were prepared under the supervision of

counsel in anticipation of trial, were sent by counsel or counsel's representatives to Robins' employees, seek information in connection with ongoing litigation, and contain counsel's mental impressions, opinions and conclusions. Plaintiffs suggest that because the memoranda contain the signature of a sales representative they are not protected by either the attorney-client privilege or the work product doctrine. The Court disagrees. The memoranda in question are precisely the type of documents the United States Supreme Court recognized to be attorney-client communications in *Upjohn Co. v. United States,* 449 U.S. 383 (1981). Similarly, since the memoranda were prepared in anticipation of litigation, the work product doctrine attaches. Fed. R. Civ. P. 26(b)(3).

Next, plaintiffs contend that if the documents are privileged, they lost their privileged status because of the crime or fraud exceptions to the work product doctrine and attorney-client privilege. Under Kansas law, the attorney-client privilege does not extend to "a communication if the judge finds that sufficient evidence, aside from the communication, has been introduced to warrant a finding that the legal service was sought or obtained in order to enable or aid the commission or planning of a crime or tort." K.S.A. § 60-426(b)(1) (1983). The Tenth Circuit has set forth the standards governing consideration of the crime or fraud exception to the work product doctrine in *In Re Grand Jury Proceedings* (*Vargas*), 723 F.2d 1461, 1467 (10th Cir. 1983):

> The privilege does not apply where the client consults an attorney to further a crime or fraud. . . . Before the privilege is lost "there must be 'prima facie' evidence that [the allegation of attorney participation

> in a crime or fraud] has some foundation in fact." (Citations omitted.) . . . As this court held in its opinion *In re September 1975 Grand Jury Term,* 532 F.2d 734 (10th Cir. 1976), "[t]he determination of whether the [party] shows a prima facie foundation in fact for the charge . . . lies in the sound discretion of the trial court." *Id.* at 737.

Robins suggests that there is disagreement concerning whether the crime or fraud exception even applies to the work product doctrine. In its later opinion *In Re Grand Jury Proceedings* (*Vargas*), 727 F.2d 941, 946 (10th Cir. 1984), the Tenth Circuit clarified that its earlier *Vargas* opinion was intended to "set forth the standards to be employed by the trial court when determining the application of the crime or fraud exception to the attorney-client or work product privileges."

Robins is correct in noting that the attorney-client privilege is not destroyed when a client seeks advice about a past crime or fraud. *In Re Grand Jury Proceedings,* 604 F.2d 798, 802 (3d Cir. 1979). As Robins points out, a contrary rule would destroy the privilege when it is needed most. The threshold test is evident from the language of the statute: the legal advice must be "sought or obtained in order to enable or aid the commission or planning of a crime or tort." K.S.A. § 60-426(b)(1).

Robins appears to advance an argument that the plaintiffs' prima facie showing must include proof that Robins had constructed a fraudulent plan prior to consulting with its attorneys. The statutory language that the legal service must not be "obtained . . . to enable or aid" a crime or fraud does not preclude the circumstance in which the crime or fraud originates with the attorneys' advice or evolves from attorney-client interactions. Furthermore,

the statute clearly imports that if legal services are used to "aid the commission," in other words to cover up, a continuing crime or fraud, then the attorney-client privilege is lost.

The focal issue is whether the record reflects sufficient evidence to invoke the crime or fraud exception. The Court does not offer any opinion as to the truth of the facts asserted in the pleadings. At this juncture, the Court is concerned solely with applying the known facts to the plaintiffs' burden of establishing a prima facie showing of crime or fraud. Therefore, the conclusions reached in this opinion are limited to the purposes of this motion and do not reflect this Court's opinions about the merits of the case.

The Court has reviewed and examined all motions and attachments submitted by plaintiffs and by Robins with respect to this matter. In addition, the Court has reviewed the Amicus Curiae Brief in Support of Plaintiffs' Motion to Compel, Dk. no. 749, the Burke memoranda submitted for the Court's *in camera* inspection and all pleadings and Magistrate Wooley's Order in the *Goss et al.* cases. Furthermore, the Court brings its over nine years of experience with the multidistrict litigation to bear on the ruling in this matter.

Robins fears that the Court will engage in the reasoning that because Robins is accused of fraud and is defending against those accusations that the defense itself is a fraud and thus the privileges are lost. The Court agrees that such reasoning would be illogical. The Court would point out, however, that the plaintiffs' allegations are much different than this characterization. Plaintiffs sug-

gest that fraud is involved in Robins' defense of this litigation and that the fraud has extended to a cover up of initial acts of wrongdoing.

Attached to Plaintiffs' Second Supplemental Memorandum in Support of Motion to Compel Production is a report by Special Masters Peter N. Thompson and Thomas C. Batsch concerning waiver of the attorney-client privilege and the work product doctrine by Robins. The Masters examined over 15,000 pages of documents that were produced for *in camera* inspection. Further, the Masters were appointed specifically to monitor and assist with discovery in related Dalkon litigation in the United States District Court for the District of Minnesota. Although the Masters applied the Minnesota law of privilege to the facts before them, Minnesota law does not differ substantially from the law applied in the present case. In fact, the Minnesota law appears to be more stringent than the Kansas law regarding the crime or fraud exception: the Masters note that "courts have placed a heavy burden on the party opposing the claim of privilege to establish a *prima facie* case . . . ." *Hewitt v. A. H. Robins,* No. 3-83-1291 (Report (II) of the Special Masters) at 4 (D. Minn., *unpublished,* February 21, 1985).

In *Hewitt* and in the present case, plaintiffs allege that Robins has engaged in an ongoing scheme of knowing misrepresentation to the public concerning the effectiveness of the Dalkon Shield. Plaintiffs maintain that even after Robins stopped marketing the Dalkon Shield large numbers of women continued to use the product and the company continued to represent that the Shield was both safe and effective. In particular, the Masters refer to

Robins' reliance on a study by Dr. Hugh Davis to support the claim that the Dalkon Shield was effective in preventing pregnancy. The Masters note that "Robins' reliance on the Davis study . . . is questionable because it involved a predecessor product to the marketed Dalkon Shield." *Id.* at 13. Furthermore, with regard to studies by Drs. Earl, Ostergard and Gabrielson, which Robins used as promotional tools, the Masters determined: "Robins published and cited the studies to encourage sales when Robins knew that the results of the studies were inaccurate and misleading." *Id.* at 16. The Masters concluded:

> Defendant was well aware that pregnancy is associated with increased health risks, and that women, particularly women with pre-existing health problems, might choose, or be prescribed, the Dalkon Shield as opposed to another contraceptive to protect against exposure to the adverse health risks of pregnancy. Defendant subsequently was informed of a possible increased risk of septic abortion associated with pregnancies occuring with the Dalkon Shield in place. (See Dear Doctor Letter of 1974.) Thus, representations as to the efficacy or pregnancy rate of the Dalkon Shield reflect directly on the safety of the product. The allegation that a Drug Company would knowingly misrepresent to the public the safety characteristics of its product is a most serious allegation. In our view, such a serious allegation must be, *and in this case was,* carefully substantiated before concluding that a *prima facie* case of fraud has been established.

Id. at 17 (emphasis added).

For the purpose of their rulings on the attorney-client privilege and the work product doctrine, the Masters determined that the plaintiffs had established a strong prima facie case that Robins, with the knowledge and participation of counsel, engaged in an ongoing fraud by misrep-

resenting the safety and efficacy of the Dalkon Shield from 1970 to 1984:

> Plaintiffs maintain that the ongoing scheme to misrepresent to the public the nature and efficacy of the Dalkon Shield was perpetuated in a cover up phase at the direction of William A. Forest, Jr., Secretary and General Counsel. It is clear from the various depositions and exhibits that the legal department was closely involved in questions of labeling, marketing, product characteristics, dealings with the FDA, as well as litigation about the Dalkon Shield. Thus, it is a reasonable inference that corporate counsel was aware of the facts giving rise to the ongoing fraudulent scheme discussed above.

Id. at 18.

Finally, the Masters pointed to the decision in *Harre v. A. H. Robins,* 750 F.2d 1501 (11th Cir. 1985), in which the Eleventh Circuit concluded that a Robins' expert witness/consultant committed perjury, with complicity of counsel. The Masters stated, "We obviously do not rely on these decisions for our factual determinations in this matter, but they do tend to corroborate our finding of at least a *prima facie* case of a massive fraudulent scheme perpetuated on the public with the knowing assistance of members of the professional bar." *Id.* at 24.

In addition to the reports of the Special Masters, plaintiffs point to other evidence that Robins, with the assistance of counsel, conducted its affairs so as to cover up some aspects of its marketing, testing and advertising of the Dalkon Shield. The Amicus Curiae Brief, filed by Florida counsel Stephen Lindsey Gorman, points to discovery misconduct occurring in cases assigned to the Honorable Miles Lord in the United States District Court for

the District of Minnesota. Judge Lord conducted discovery proceedings and learned that numerous files which had been requested by plaintiffs were never produced by Robins. Judge Lord entered an Order, including the following finding:

> It is true that this has been a much discovered case for nearly a decade now. It is also true that the defendant has been subject to discovery conducted pursuant to the Multidistrict Litigation Proceedings. However, despite all of this previous discovery, the documents presently sought by plaintiffs have never been produced. *Indeed, defendant's counsel admitted that many of these sought after files have never been reviewed for nonprivileged material, notwithstanding the fact that the files likely contain information that would have been responsive to previous discovery requests.*

Dean et al. v. A. H. Robins, No. 3-83-1025 (D. Minn. *unpublished,* February 9, 1984). In his Order, Judge Lord required Robins to produce all documents concerning safety tests conducted on the Dalkon Shield. Robins filed a petition for writ of mandamus seeking review of Judge Lord's February 8, 1984 Order. On February 23, 1984, the Eighth Circuit Court of Appeals denied the petition for writ of mandamus. *In Re A. H. Robins Co., Inc.,* No. 84-5028 (8th Cir., *unpublished,* February 23, 1984).

Although Robins complains about the use of other proceedings as evidence of crime or fraud in the instant case, the Court finds Robins' procedural conduct in other cases to be relevant to the present motion. When the issue is whether Robins perpetrated a massive fraud to deceive the public, the cases across the country cannot be viewed as discrete and isolated instances.

In the present MDL proceedings, this Court conducted extensive discovery, including document production and depositions of Robins' employees. In August of 1981 and again in September of 1982, the Court reopened discovery proceedings when plaintiffs represented that much documentation existed that had not been produced During the course of the reopened discovery, many additional documents were produced.

For purposes of ruling on the present motion, the Court examined a wealth of evidence concerning document production in these and other proceedings. In light of the history of document production in the instant actions, the pleadings submitted by both parties, the amicus brief and attachments and the reports of the Special Masters, the Court concludes that plaintiffs have made a prima facie showing that Robins "sought or obtained [legal advice] in order to enable or aid the commission or planning of a crime or tort," *see* K.S.A. § 60-426(b) (1), and that the allegations of Robins' attorneys' participation in the crime or fraud have some foundation in fact. *See Vargas,* 723 F.2d at 737. Consequently, the attorney-client privilege and the work product doctrine have been lost to some extent.

The Court reemphasizes that this holding is limited to whether plaintiffs have made a threshold showing to sustain the crime or fraud exception to the attorney-client privilege and the work product doctrine. Once the threshold standard is met, evidence may be considered for discovery purposes if it will lead to other relevant evidence; the same standard does not apply to other stages of the proceedings. The Court's holding should not be read to

take any position regarding whether Robins or Robins' counsel have perpetrated a crime or civil fraud; the inquiry was targeted to whether the plaintiffs established that the Court should invoke the crime or fraud exception to the attorney-client privilege and the work product doctrine.

The final matter for the Court to determine is to what extent the attorney-client privilege and work product doctrine have been abandoned. Neither the Tenth Circuit nor the Kansas Supreme Court has addressed the extent to which the privileges are lost once the exception is established. The Eighth Circuit has required that the documents containing the work product "bear a close relationship to the client's existing or future scheme to commit a crime or fraud." *In Re Murphy,* 560 F.2d 326, 338 (8th Cir. 1977). In *In Re International Systems and Controls Corporation Securities Litigation,* 693 F.2d 1235, 1243 (5th Cir. 1982), the Fifth Circuit held that the work product "must reasonably relate to the fraudulent activity." This Court believes that the prima facie showing of crime or fraud cannot open defendant's files completely or give plaintiffs carte blanche with respect to attorney-client communications. The Court holds that the memoranda in question must have a reasonable relation to the ongoing fraud to be discoverable under the crime or fraud exception. Robins has submitted the Burke memoranda for *in camera* inspection. Given that the contents of the memoranda have a reasonable relation to the activities discussed above as evidence of crime or fraud, the Court finds that the Burke memoranda are discoverable by plaintiffs.

IT IS THEREFORE ORDERED that plaintiffs' motion to incorporate the Wooley Order into the instant proceedings is hereby denied.

IT IS FURTHER ORDERED that plaintiffs' motion to compel production of the Burke memoranda is hereby granted.

At Wichita, Kansas, on this 5th day of April, 1985.

/s/ Frank G. Theis

United States District Judge

Office Supreme Court, U.S.
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CLERK

No. 84-1624

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

A.H. ROBINS COMPANY, INCORPORATED,
Petitioner,

v.

HONORABLE FRANK G. THEIS
Judge of the United States District Court
for the District of Kansas,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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REPLY BRIEF OF PETITIONER

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QUESTION PRESENTED

May a United States district judge rule on factual issues concerning which he has previously been a witness by giving an affidavit in a separate judicial proceeding?

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REPLY BRIEF OF PETITIONER

Petitioner A.H. Robins Company, Incorporated ("A.H. Robins") submits this brief in reply to the brief in opposition submitted by plaintiffs. The statement required by Rule 28.1 of the Rules of this Court is contained in A.H. Robins' petition for certiorari.

OPINION BELOW

Judge Theis' Opinion and Order denying A.H. Robins' motion for disqualification has now been reported as *In re A.H. Robins Company, Inc. "Dalkon Shield" IUD Products Liability Litigation*, 602 F. Supp. 243 (D. Kan. 1985).

ARGUMENT IN REPLY

I. The Importance Of This Case Justifies Review By This Court

Plaintiffs' first argument is that this case involves only an error by a trial judge in pretrial proceedings and therefore does not warrant review in this Court. Plaintiffs' Brief in Opposition to Petition for Writ of Certiorari ("Brief Opp.") 5. Plaintiffs thereby seek to equate Judge Theis' improper dual role as witness and judge with some run-of-the-mill pretrial discovery dispute.

The fact is that this case presents an important question—never before squarely addressed by this Court—on the permissible scope of a United States judge's activities under 28 U.S.C. § 455(a). Judge Theis' opinion has now been reported and, contrary to plaintiffs' assertion, Brief Opp. 6, obviously stands as a federal precedent. His opinion, stripped to its essentials, holds that it is perfectly proper to serve both as witness and judge *on the same facts.* (Importantly, neither plaintiffs in their Brief nor Judge Theis in his opinion deny that Judge Theis' affidavit and plaintiffs' motion for sanctions present similar issues of fact.) This pernicious ruling should be reviewed by this Court.

Next, plaintiffs argue that Judge Theis has made only a factual determination. Brief Opp. 6. This is simply wrong. Section 455(a) sets forth an objective standard of law. *See Roberts v. Bailar*, 625 F.2d 125, 128-29 (6th Cir. 1980). There is no dispute in this case on the facts, and the only issue is the correct interpretation and application of § 455(a). In addition, Judge Theis' opinion has the wide-ranging implication that a United States judge may serve as a "knight errant" by intervening as a partisan in proceedings not before him without creating any appearance of bias. *See* B. Cardozo, *The Nature of The Judicial Process* 141 (1921). Thus, the question presented to this Court is not fact-bound.

For these reasons, A.H. Robins submits that the importance of this case warrants granting the writ of certiorari.

II. The Standard For Disqualification Under § 455(a) Should Be Considered By This Court

Plaintiffs correctly point out that there is no clear-cut dispute on the legal standard under § 455(a). Brief Opp. 5-6. Yet Judge Theis' opinion, and the gloss on it by plaintiffs, suggest the need for examination of this standard by this Court.

Judge Theis' refusal to disqualify himself is improper on its face. He submitted a sworn affidavit highly critical of A.H. Robins with respect to specific matters, and now he intends to sit in judgment *on those same matters.* Plaintiffs claim the affidavit was submitted merely to "assist" the Eighth Circuit Judicial Council in the investigation of Judge Miles W. Lord. Brief Opp. 6. Plaintiffs' polite euphemism should not be allowed to obscure what is obvious—that Judge Theis acted in concert with Judge Lord with the deliberate purpose of damaging A.H. Robins.

Plaintiffs, like Judge Theis, claim his affidavit gives "rise to no reasonable apprehension of bias." Brief Opp. 7; Judge Theis' opinion at 11a in Appendix B to the petition for certiorari. This claim is incredible in light of the statements by Judge Theis in the affidavit. For example:

> Without knowing all the details, it appears that *under the circumstances known*, Judge Lord's remonstrance to the responsible company officials *was mild punishment indeed considering the strong possibility that such apparent misrepresentations and trial tactics seem to permeate the proceedings* here and elsewhere (emphasis added).

Affidavit at 23a-24a in Appendix C to the petition for certiorari. No one could reasonably think that this state-

ment shows the impartiality required of United States judges.[1]

Both plaintiffs and Judge Theis defend his conduct on the ground that his affidavit was not based on "extrajudicial" sources and that his private, ex parte communications with Judge Lord's counsel were proper. This argument is not sound.

The affidavit and its sources were extrajudicial for at least three reasons: First, A.H. Robins was never given notice or an opportunity to be heard in connection with Judge Theis' consideration of the affidavit. Judge Theis, with the help of Judge Lord's counsel, conducted a private investigation without the presence or knowledge of A.H. Robins. This private investigation was extrajudicial because it took place outside the adversary process.

Second, Judge Theis based his affidavit on sources *outside* the record before him in MDL-211. Indeed, in his affidavit Judge Theis stated that based on his experience in MDL-211 he was "satisfied" with A.H. Robins' responses to plaintiffs' discovery. Affidavit at 21a in Appendix C to the petition for certiorari. The basis for Judge Theis' criticism of A.H. Robins was not the record in MDL-21—it was his ex parte communications with counsel for Judge Lord. *Id.*

Finally, Judge Theis knew that his affidavit would become a public document. Plaintiffs state that his affidavit "made its way into the public record but not through any action by Judge Theis." Brief Opp. 9. This is mistaken. Judge Theis voluntarily submitted the affidavit in a separate proceeding he knew had been opened to the public at the express request of Judge Lord.

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[1] Because the Judicial Panel on Multidistrict Litigation has denied A.H. Robins' motion to transfer under 28 U.S.C. § 1407, Judge Theis will remain as the transferee judge in MDL-211. In re A.H. Robins Co., Inc. "Dalkon Shield" IUD Products Liability Litigation, MDL-211 and -631 (J.P.M.L., May 28, 1985).

In contrast to the facts here, this Court in *United States v. Grinnell Corp.*, 384 U.S. 563, 582-83 (1966), approved Judge Wyzanski's conduct in reviewing the record created by the parties to the case before him. (Judge Wyzanski acted at the express request of the parties to assist in settlement negotiations.) There are no points of similarity between the conduct approved in *Grinnell* and Judge Theis' private investigation here. *See SCA Services, Inc. v. Morgan*, 557 F.2d 110, 116 (7th Cir. 1977) (Inquiry by judge to his brother "creates an impression of private consultation and appearance of partiality"); *Code of Judicial Conduct for United States Judges*, Canon 3(A)(4) ("A judge should neither initiate nor consider ex parte or other communications concerning a pending or impending proceeding").

This case is the logical next step after *Grinnell* for this Court in defining the meaning of "extrajudicial" in the federal law of disqualification. Since this case arises on clear, undisputed facts, and because the issue is important to the federal judiciary, certiorari should be granted.

CONCLUSION

For the reasons stated above and in its petition for certiorari, A.H. Robins requests this Court to grant the writ of certiorari to review the judgment of the Tenth Circuit.

Respectfully submitted,

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May 31, 1985